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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 152

EL DORADO OIL WORKS, a Corporation,
Appellant,

vs.

CHARLES J. McCOLGAN, as Franchise Tax Commissioner of the State of California,
Appellee.

APPELLANT'S BRIEF IN RESPECT TO A MOTION TO DISMISS OR AFFIRM.

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Table of Authorities Cited

Cases	Pages
Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203	20
Butler Bros. Co. v. McColgan, 315 U.S. 501, affirming 17 Cal. (2d) 654	1, 7, 10, 11
Capital Greyhound Lines v. Brice, 90 Sup. Ct. 806	16, 18
Hans Rees Sons v. North Carolina, 283 U.S. 123	5, 7, 20
Illinois Central v. Minnesota, 309 U.S. 157	15, 17
International Harvester Co. v. Evatt, 309 U.S. 411	16, 17, 18, 19
Matson Navigation Co. v. State Board, 3 Cal. (2d) 1, 297 U.S. 441	18
People ex rel. Alpha Portland Cement Co. v. Knapp, 129 N.E. 292	6, 7, 12, 20

Constitutions	
California Constitution, Article XIII, Section 16	11
United States Constitution, Fourteenth Amendment	4

Statutes	
California Bank & Corporations Franchise Tax Act (Stats. 1929, p. 19, amended, Stats. 1931, pp. 22, 26, Stats. 1935, p. 965):	
Section 4	13
Section 4(3)	2
Section 10	2, 3, 4, 7, 8, 9, 11, 13

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Appellee.

APPELLANT'S BRIEF IN RESPECT TO A MOTION TO DISMISS OR AFFIRM.

Appellee's motion is based on the claim that no substantial Federal question is involved because the questions presented have been foreclosed by previous decisions of this Court. In support of this contention Appellee cites and primarily relies upon the decision of this Court in *Butler Bros. Co. v. McColgan,* 315 U. S. 501, affirming 17 Cal. (2d) 654. We shall analyze

this Court's decision in that case and shall refer to the decision of the California Supreme Court only as may be necessary in the interest of clarity.

The present appeal involves the construction and proper application of the allocation formula prescribed in Section 10 of the California Bank & Corporations Franchise Tax Act (Stats. 1929, p. 19, amended, Stats. 1931, pp. 22, 26, Stats. 1935, p. 965). Section 10 of the Act, as it read in the taxing years 1934 and 1935, and also Section 4(3), which provided for the imposition of the tax, are set out in Appendix A hereto attached. Section 4(3) provided that all corporations doing business in California should pay a tax equal to 4% of the net income resulting from business done within the State of California. Section 10 provided that, if the business of the corporation was carried on partly within and partly without the State of California, "the portion of net income from business done within the State shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, payroll, value and situs of tangible property, or by reference to these or other factors or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to business done within this state. * * *" The business done by Appellant in the tax years 1934-1935 came within this category and was a "unitary" business as that term is generally used and applied. Appellant within the time required by this statute and in the form provided by Appellee for that purpose, filed the requisite Franchise

Tax report and allocated its earnings for each of the taxable years by a formula based upon the five factors named in Section 10. The Appellee subsequently reallocated Appellant's income by a formula of his choice which excluded the factor of "manufacturing costs," entirely disregarded out-of-state purchases and classed as "within the state sales" 100% of Appellant's gross sales in disregard of Appellant's uncontroverted evidence that 61.4971% of such sales in the year 1934 and 77.7179% of such sales in the year 1935 were made outside of the State of California and were so reflected in Appellant's allocation for those years. Appellant's allocation schedule for the taxable year 1934 is shown in the record as Plaintiff's Exhibit 1 and for the taxable year 1935 as Plaintiff's Exhibit 2. Appellee's allocation schedules appear in the record as Exhibits 3, 4 and 5, respectively. Appellant admitted in the Trial Court and again in the Supreme Court of California that it was engaged during the taxable years in a unitary business, and therefore that an allocation of its income under the provisions of Section 10 of the Bank & Corporations Franchise Tax Act was necessary. It also conceded that the Statute as written was not unconstitutional. Appellant contended, however, that Appellee's allocation formula did not conform to the requirements of Section 10 in that it omitted the factor of "manufacturing costs" and entirely disregarded the item of out-of-state purchases which aggregated $963,280.11 in 1934 and $2,282,331.01 in 1935 and which constituted 89.9% of appellant's 1934 pur-

chases and 73.3% of its 1935 purchases. These should have been included under the statutory factor "purchases"; also that it arbitrarily classed as sales made within the state 100% of Appellant's gross sales in each of the years, in disregard of Appellant's uncontroverted evidence that 61.49% of Appellant's 1934 sales and 77.71% of Appellants' 1935 sales were made without the State of California. The essential question thus presented in the Trial Court and again in the Supreme Court of California, and now before this Court on this appeal, is as to the proper construction of the allocation formula set out in Section 10 of the Act and the legality of the Appellee's application of that Act in the allocation of Appellant's income and the assessment of the taxes here complained of. If the Statute had provided for the allocation to the State of California of all of Appellant's property without the state or all income earned entirely without the state, the Statute itself would be unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States. This has been held by this Court in various cases which do not require specific mention here. If, on the other hand, whatever may be the provisions of this Statute, the agency charged with the administration of the Act has by its system of allocation assigned to the State of California and taxed income derived from business done without the state, and the Supreme Court of the taxing state has held that method to be warranted under the Statute, the Statute as so construed and the tax levied under the assumed author-

ity thereof results in a violation of the Fourteenth Amendment of the United States Constitution. That is the Federal question involved in this appeal; and the contentions of the Appellant are upheld by the decision of Chief Justice Hughes in the case of *Hans Rees Sons v. North Carolina*, 283 U.S. 123. That case turned on the construction and application of a formula for the allocation of income of a corporation conducting a unitary business in more than one state. This Court reviewed its previous decisions dealing with questions of the same or similar import, announced the general principle that where a corporation carrying on a unitary business, manufactures in one state and sells in another, the profits of the entire transaction as a unitary enterprise may not be attributed to either state (283 U.S. 132). It also held that as to such an enterprise all of the factors in that enterprise are essential to the realization of profits and that the entire net income may not be taxed in one state regardless of the extent to which it may be derived from the conduct of the business in another state. In the instant case it was definitely established by uncontroverted evidence that Appellant's profits were so obtained from the purchase of raw materials, the processing thereof and the sales of the resulting products.

Evidence to the same effect was before this Court in the *Hans Rees* case. This Court there held that the allocation to the State of North Carolina of the entire profits resulting from the manufacturing operations within that state regardless of the profits resulting

from the purchase of hides without the state, served to arbitrarily attribute to North Carolina a percentage of income out of proportion to the business transacted within that State. On that ground this Court held that the taxes so laid were beyond the state's authority, and repugnant to the Due Process provisions of the United States Constitution in that the tax so levied ignored the out-of-state purchases of hides.

The fallacy and inequality of Appellee's arbitrary exclusion of the factor "purchases" and his reclassification of 100% of Appellant's gross sales to the State of California, is well illustrated in the case of *People ex rel. Alpha Portland Cement Co. v. Knapp*, 129 N.E. 292. The New York statute there construed provided that the net income to be allocated to the state should be in the ratio that certain classes of assets in the state bore to the aggregate of all assets of that class wherever situated. The Court observed that the scheme of allocation as applied by the taxing authority took no heed of certain investments without the state. In holding such allocation to be arbitrary and unreasonable, Judge Cardozo said:

> "It measures the value of the franchise, here and elsewhere, by income from all sources and excludes some of the same sources when the value is apportioned. To take from assets elsewhere is equivalent to adding to assets here. * * * I am unable to avoid the conclusion that a method of apportionment which purposely ignores realities, which compels an assessor to look to some of the assets only and close his eyes to all others, is

arbitrary and unreasonable in its increase of the local burden."

The formula adopted by Appellee in assessing Appellant's franchise here accomplishes the identical result condemned by Judge Cardozo in that it ignored the reality of profits arising from Appellant's tremendous out-of-state purchases and sales. Although that case was decided by the Court of Appeals of the State of New York, certiorari was denied by this Court (256 U.S. 702).

The problem before this Court on the present appeal goes much deeper and is more vital than any question as to whether the allocation of Appellant's earnings for franchise tax purposes may be made by the use of a three-factor formula instead of the five factors named in Section 10 of the Act. Inasmuch, however, as Appellee has cited the decision of this Court in *Butler Bros. v. McColgan* as upholding the use of a three-factor formula, we will now consider that case in detail.

The questions considered by this Court in the above cited cases of *People ex rel. Alpha Portland Cement Company v. Knapp* and *Hans Rees Sons v. North Carolina* are the identical questions here involved and constitute the Federal question before the Court on this appeal. We believe that the decisions of this Court in the cited cases should be controlling.

The case of *Butler Bros. v. McColgan* did not uphold a three-factor formula as a substitute for the five-factor formula set out in Section 10 of the Act,

nor did it involve a question of allocation of the taxpayer's earnings for the purpose of fixing the amount of the Franchise Tax to be assessed under the Act. Butler Bros. was organized under the laws of the State of Ohio. It maintained its principal place of business and headquarters in the City of Chicago. It, however, operated branch plants in various states, including one in California, for the sale and distribution of its goods which were purchased through its central office in Chicago. Goods so purchased were billed at cost and shipped to the various state branches, of which California was one. Overhead and other operating expenses were apportioned to the various states in which branches were located more or less according to the business done, all profits and losses being entered in the principal office in Chicago. By its apportionment of costs and expenses the Company showed for Franchise Tax purposes that it realized a negligible or no profit from its operations in the State of California, whereas, the total profit from all of its branches was a considerable sum. In the circumstances the Company denied that it did a unitary business and refused to concede to the State of California a right to allocate its earnings according to the provisions of Section 10 of the California Bank & Corporations Franchise Tax Act. It contended that under the Statute no allocation whatever of its earnings was permissible and that its Franchise Tax liability, if any, should be computed on its separate California profit. The case was briefed and argued solely on the question whether the Com-

pany did a unitary business and the allocation provided for in Section 10 could be made by Franchise Tax Commissioner.

Inasmuch as the Company claimed and presented its case, in all the Courts, upon the sole ground that no allocation formula whatever was applicable, because the Company was not engaged in a unitary business, it could not and did not contend for any particular method of allocation. The Supreme Court of California concluded on the basis of the evidence before it that the Company was engaged in a unitary business and that the allocation formula set out in Section 10 of the Act could be properly applied; also that, inasmuch as the taxpayer made no claim that the three-factor formula as applied, was either arbitrary or unfair, under the facts of the case, there was no reason to condemn it or any necessity to decide whether or not it was in conformance with the provisions of the Act. This was merely an application of the well-settled principle that where a taxing authority has imposed a tax in assumed conformance with the authorizing Statute, objection to the amount of the tax will not lie in the absence of a showing of injustice or inequality. This is evidenced by the following observation of this Court at page 505 of the reported decision:

> "The propriety of the use of that formula is not questioned if by reason of the stipulated factors a formula for allocation to California of a portion of Appellant's income from all sources is proper."

It is very clear that the legality of a three-factor formula in the place of a five-factor formula provided by the Act was not in issue or involved. The opinion of the Supreme Court of California upholding or approving the Tax Commissioner's use of the three-factor formula under the facts of that case was qualified by the statement that "no showing has been made that income unconnected with the unitary business has been used in the formula." The most that can be said of the decision of the Supreme Court of California, or of the opinion of this Court affirming that decision is that the three-factor formula was not improperly used in the circumstances of that case in the absence of evidence showing that such method of allocation failed to reasonably attribute to California only the income from business done within that state. The evidence that was wanting in that case, according to the Court's opinion, is abundantly present in this case. The question or issue that was not raised in the case of *Butler Bros. v. McColgan*, namely, that the Commissioner by his allocation had unwarrantably increased the amount of earnings derived from business done within the State of California at the expense of earnings derived from business done without that state and, correspondingly, violated the Due Process provisions of the United States Constitution, was directly and continually advanced and maintained by Appellant throughout this case.

Section 10 of the California Bank and Corporation Franchise Tax Act required the use of the five factors therein named where, as in the present case, the factual information was available.

This statute was enacted by the California legislature pursuant to and in furtherance of the Constitutional amendment (1928 Art. XIII, Sec. 16), which provided for the manner of valuing franchises for taxation purposes. The Legislature alone was authorized to determine the method of valuation. The evident purpose of the Legislature was to fix the value of the franchise to be assessed by applying a formula consisting of five factors which, it was thought, would reasonably assign to the State of California, for taxation purposes, that portion of the corporation's net income which was attributable to business done within the state. All of the factors were of equal value in the formula and the use of all of those factors, rather than some only, was in the concept of the members of the Legislature the method established by the Legislature under the authority of the Constitutional amendment. The Legislature contemplated that the allocation should be made by the five factors set out in Section 10 or by some other method of allocation that is fairly calculated to assign to the State of California a portion of net income reasonably attributable to the business done within that state. The Legislature did not contemplate that some only of the five factors might be used and others omitted. That would have destroyed the balanced average. This

construction of the statute is borne out by the fact that in 1939 the Legislature amended Section 10, which was four years after the tax here involved was levied, to provide that the allocation might be made by the use of the five factors *or any of them* or other factors. If the allocation in the taxable years could have been made by the use of some of the named factors only, this 1939 amendment was wholly unnecessary. If, on the other hand, it was necessary, as the Legislature evidently thought, then the license to select some of the five factors and disregard others did not previously exist. We believe that Section 10, as originally enacted and as it read during the years in which the taxes herein questioned were imposed, represented the Legislature's matured judgment as to a formula that would embrace all of the factors entering into the profit of a unitary corporation and, by a division of each factor between within-the-state and without-the-state profits, would in the average fairly show what portion of the aggregate profits represented earnings from business done within the state. The elimination of any one of the factors would destroy the balanced average and in its finality either unduly increase or decrease the percentage of profit earned within the state or without the state. This was realistically condemned by Judge Cardozo in the case of *People ex rel. v. Alpha Portland Cement Co.*, supra.

It may be urged, not without reason, that the statutory construction above contended for is not necessary for the proper determination of the motion be-

fore this Court. If, however, as we contend, Section 10 should be read as requiring the use of the five-factor formula as the embodiment of the Legislature's matured opinion, the use by Appellee of three factors or any number less than the named five would constitute a fatal departure from the provisions of the statute imposing the tax. Compliance with such statutory provisions is always essential to the validity of the tax.

Whether the allocation provided for in Section 10 of the Act was to be made by the use of the five factors, as we have heretofore urged, or by some other method, it was necessary that the result should assign to California for taxation purposes, only that portion of the taxpayer's net earnings which was reasonably attributable to business done within the state. This was essential to the validity of the statute because the constitutional amendment hereinabove noted, only permitted the taxation of income arising from business done within the state, and the enabling section of the Act (Section 4) only provided for the taxation of intra-state income.

The claim is advanced in Appellee's brief that the Trial Court found and the Supreme Court affirmed that Appellee did not in his allocation include the percentage of income earned outside of the State of California. This claim is completely answered by the uncontroverted facts hereinabove noted, and also by the allocation schedules shown in the record as Exhibits 1, 2, 3, 4 and 5. The claim is also negatived by

the assertion in Appellee's brief that Appellee's disregard of out-of-state purchases was overcome through Appellee's use of the factors of payroll and property. This assertion is without support in the record. Appellant's schedule of allocations (Exhibits 1 and 2) which meticulously set out Appellant's total purchases for each of the years with the breakdown showing that Appellant's out-of-state purchases in the year 1934 totaled $963,290, which was 89.99% of Appellant's total purchases for that year. The 1935 schedule (Exhibit 2) likewise listed Appellant's 1935 purchases in the amount of $2,282,331 or 73.36% of the total purchases as having been made without the State of California. In his allocation Appellee made no change in the amount of Appellant's purchases. He simply ignored the out-of-state purchases, and thus, in effect, allocated all of Appellant's purchases to the State of California. The figures set out in Appellant's said allocations were attested as correct by Appellant's accountant, also by Appellant's Vice President, and were confirmed as correct by a Certified Public Accountant, who testified that he had personally examined Appellant's books and records and determined that Appellant's figures and the allocations reported were correct. There was no evidence in the Trial Court in opposition to this showing. Appellee accepted Appellant's figures as to gross sales and gross purchases. Those figures so accepted could not have a different significance when used by Appellee in his allocations and, therefore, the claim that Ap-

pellee in using those figures cured the omission of the out-of-state purchases figures is without merit. This is apparent in the fact that Appellant's out-of-state purchases in the year 1934, which amounted to $963,280, and its out-of-state purchases in the year 1935, which totaled $2,282,331, could not by any method of calculation have been included in the item of wages which only totaled $206,763 in the year 1934 and $266,412 in the year 1935. Nor for the same reason could they have been included in property values. These totals were not changed by Appellee to include the much larger figure of out-of-state purchases in either of the two years. If, as was established by Appellant's incontroverted evidence, Appellant's schedules correctly stated the amount of property within and without the state and the amount of wages paid within and without the state, as well as the purchases within and without the state, those figures could not be distorted as was done by Appellee to include out-of-state purchases in the category of either wages or property, which factors in the aggregate were very much less than the amount of out-of-state purchases. It is incontrovertible that Appellee in his allocations simply disregarded in their entirety the items of out-of-state purchases in both of the taxable years, although those items represented Appellant's largest single expense.

In further support of his motion to dismiss Appellee has referred to: *International Harvester Co. v. Evatt*, 309 U.S. 411, *Illinois Central v. Minnesota*,

309 U.S. 157 and *Capital Greyhound Lines v. Brice*, 90 Sup. Ct. 806.

These cases will be considered as a group because in effect they are all cited to the point that this Court has long recognized the practical impossibility of a state's achieving for taxation purposes a perfect apportionment of complex business activities and that "rough approximation" rather than precision is sufficient. Whatever may be said of its generality, this doctrine has no bearing on Appellee's motion to dismiss or on the merits of the present case. In the International Harvester case the taxpayer claimed that under the statute there considered the state had laid an unlawful tax upon interstate commerce. This Court stated, and the record supports its statement, that the tax there under attack was not imposed on interstate commerce, but that the amount of interstate commerce as well as other items were used as a means to admeasure for tax purposes the value of certain properties held by the taxpayer. The taxing statute and the method of applying it were entirely different from those provided in the California statute. If, as might be inferred from the excerpt from that opinion quoted in Appellee's brief, it is difficult or impossible for a state to devise an exact or appropriate method for the fixing of values for taxation purposes, and that "rough approximation" rather than precision is all that may be required, that situation was not existent in the present case. The California Bank & Corporations Franchise Tax Act,

under which the tax complained of was assessed, is definite and perfectly clear in its provisions and requirements. The method of allocation is simple and applicable as is shown by Appellant's allocations (Exhibits 1 and 2) and likewise shown in Appellee's schedules (Exhibits 3, 4 and 5) except for the fact that Appellee did not follow the statutory provisions. The unscientific doctrine announced in the *International Harvester* case was first expressed in *Illinois Central v. Minnesota,* also cited by Appellee. The tax complained of in that case was a property tax, not a privilege tax, as to which the rules are very different. It has been long established that in respect to property taxes the assessing authority is permitted a wide discretion, and his action is protected by the presumption that official duty has been performed. There is no inherent difficulty in the way of a state's providing for the levying of a property tax. There is nothing in the record of the *Illinois Central* case to warrant the Court's observation that "rough approximation rather than precision" is sufficient in the valuing of property for taxation purposes. Furthermore, the doctrine advanced in the *International Harvester* case is qualified by its context wherein the Court says:

> "Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments."

The case of *Capital Greyhound Lines v. Brice* is likewise not in point either on the motion to dismiss or on the merits of the present case. That case presented an attack on the validity of a Maryland statute which imposed a tax on motor vehicles according to their cost and value for the privilege of using the Maryland highways. This Court held that the formula was not inherently unfair to the interstate carriers who attacked the statute and that those carriers did not show that there was any discrimination against interstate carriers in the administration of the law. The basis of Appellee's motion to dismiss is that, as he claims, no substantial Federal question is presented. That question was not involved or considered in the *International Harvester* case, the *Illinois Central* case or the *Capital Greyhound* case. If, as contended by the taxpayers in those cases, the statutes imposed an unlawful tax on interstate commerce, which this Court in its opinions denied, that question has no place on this appeal. Appellant has not contended, either in the Lower Courts or here, that the California Bank & Corporations Franchise Tax Act provides for an unlawful tax on interstate commerce. It merely provides for a tax on the franchise privilege of doing intrastate business in the State of California. This Court affirming the decision of the California Supreme Court long ago held that the California statute did not impose or seek to impose a tax on interstate commerce.

(*Matson Navigation Co. v. State Board*, 3 Cal. (2d) 1, 297 U.S. 441.)

The remainder of Appellee's brief in support of his motion is given over to a discussion of sales, particularly for the purpose of determining whether or not the tax imposed thereon is a tax on interstate commerce. He asserts that an attack by Appellant in this case is foreclosed by the decision of this Court in the *International Harvester* case and other cases cited. The obvious fallacy in Appellee's argument is that Appellant has not claimed either here or in the Lower Court that the tax provided in the statute constituted an unlawful burden upon interstate commerce. Appellant's claim was and is that the allocation formula provided in Section 10 of the Act requiring that Appellant's sales and purchases should be classified so as to distinguish between those within the state and without the state. Those consummated within the state would enter into the valuation of the franchise for tax purposes, whereas, those without the state would not. Appellant is not at present concerned either in connection with the motion to dismiss or a discussion of the merits of the case with the taxing statutes of other states. We have in the California Bank & Corporations Franchise Tax Act a definite and complete taxing scheme. Whether or not the taxing scheme provided in the statute of other states is in itself lawful, or whether in its application it imposes an unlawful tax upon interstate commerce or violates any provisions of the United States Constitution, or whether in a particular case under such other statute, sales are actually or constructively made in a taxing

state or otherwise, has absolutely no bearing upon the merits of Appellee's motion to dismiss, on the ground that no substantial Federal question is presented on this appeal. The loci of Appellant's sales is a question of fact and the undisputed evidence showed that the sales claimed by Appellant to have been made without the State of California were so made. Appellee's attempted classification of such sales as made within the state was arbitrary and without any support in the evidence. No matter what may be decided or opined as to where sales considered in the cases cited by Appellee were made and whether or not they were intrastate under the statutes of other states reviewed in the cases cited by Appellee cannot by any method of reasoning, or any stretch of the imagination, have any bearing upon the merits of Appellee's motion to dismiss. Appellant will, therefore, not unduly extend this brief or impose upon this Court a critical study of the cases cited at page 7 of Appellee's brief.

In the foregoing pages we have urged that this appeal presents a substantial Federal question, that is to say, the invalidity of the Franchise Tax assessed against Appellant for the years 1934-1935 as upheld by the Supreme State of California. The taxes are essentially the same as those condemned in the decisions of this Court: *People ex rel. Alpha Portland Cement Co. v. Knapp*, 256 U.S. 702, *Hans Rees' Sons v. North Carolina*, 283 U.S. 123 and *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203. A sub-

stantial Federal question was and is thus presented which calls for the decision of this Court.

We respectfully submit that Appellee's motion to dismiss or affirm should be denied.

Dated, San Francisco, California,
July 17, 1950.

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Of Counsel.

(Appendix A Follows.)

Appendix A

California Bank and Corporation Franchise Tax Act (Stats. 1929, p. 19, amended, Stats. 1931, p. 2226, Stats. 1935, p. 965):

Section 4(3): With the exception of financial corporations, every corporation doing business within the limits of this State and not expressly exempted from taxation by the provisions of the Constitution of this State or by this act, shall annually pay to the State, for the privilege of exercising its corporate franchises within this State, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year. In any event, each such corporation shall pay annually, to the State, for the said privilege, a minimum tax of twenty-five dollars. * * *

Section 10: If the entire business of the bank or corporation is done within this State, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State. The portion of net income derived from business done within this State, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible

property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation.

If the commissioner reallocates net income upon his examination of any return, he shall, upon the written request of the taxpayer, disclose to him the basis upon which his reallocation has been made.

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APPELLANT'S PETITION FOR A REHEARING FROM ORDER GRANTING MOTION TO DISMISS.

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Cases **Pages**

Butler Bros. Company v. McColgan, 315 U. S. 501.....2, 4, 5

Hans Rees Company v. North Carolina, 283 U. S. 123..... 4, 5

International Harvester Co. v. Evatt, 329 U. S. 416.....2, 4, 5

People ex rel. Alpha-Portland Cement Company v. Knapp, 129 N. E. 202 4

Statutes

California Bank and Corporation Franchise Tax Act, Section 10 .....2, 3, 5

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APPELLANT'S PETITION FOR A REHEARING FROM ORDER GRANTING MOTION TO DISMISS.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

This Honorable Court on October 9, 1950, granted Appellee's Motion to Dismiss the Appeal in the above

captioned case and in support of its Order cited but two cases:

Butler Bros. Company v. McColgan, 315 U.S. 501,

and

International Harvester Co. v. Evatt, 329 U.S. 416.

Appellant is filing the present Petition in the conviction that the cited cases do not either factually or legally support the Order of Dismissal. For this reason and because the record has not as yet been printed, we shall deal primarily with the two cited cases.

The case of *Butler Bros. Company v. McColgan* was instituted and briefed throughout on the claim that the Company was not carrying on a unitary business and, therefore, its income was not subject to allocation under the provisions of Section 10 of the California Bank and Corporation Franchise Tax Act. Upon this ground the taxpayer contended that no allocation formula could be legally applied. The Franchise Tax Commissioner charged with the administration of the Act applied a three-factor formula in the allocation of the taxpayer's income and fixed the tax accordingly.

This Court in affirming the decision of the California Supreme Court sustained this action of the Franchise Tax Commissioner, not upon the ground that that was the only proper formula to be applied, but on the ground that Butler Bros. Company having stipulated the facts agreed that, if the application of a formula for allocation was proper, the one so applied

worked no injustice to the taxpayer. This affirmatively appears from the following statement in the opinion of this Court:

> "No other factor or method of allocation was considered. The propriety of the use of that formula is not questioned if by reason of the stipulated facts a formula for allocation to California of a portion of Appellant's income from all sources is proper."

In its opinion in the cited case this Court also stated:

> "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed. No such showing has been made here."

Such a showing was quite impossible in the cited case. In the present case Appellant has conceded that its business is of a unitary character, and, therefore, that an allocation of income was proper under Section 10 of the Act. It contends, however, that the formula used by the Franchise Tax Commissioner was not the proper formula not only because it did not conform to the provisions of the Act, that the income should be allocated so that only income reasonably attributable to business done within the State of California should be made subject to the tax, but also because the taxing authority actually omitted the matter of foreign purchases, from which Appellant realized large profits, and also arbitrarily assigned to Cali-

fornia a large volume of profitable out-of-state sales. In effect, he allocated to California 100% of Appellant's purchases and 100% of its sales in complete disregard of the uncontroverted evidence and, in fact, the admissions in the record that those purchases and sales were made without the State of California. No such question was briefed or considered in the cited case of *Butler Bros. Company v. McColgan.* Such omissions and exclusions on substantially identical facts were held by this Court in *Hans Rees Company v. North Carolina,* 283 U.S. 123 and in *People ex rel. Alpha-Portland Cement Company v. Knapp,* 129 N.E. 202 (certiorari denied by this Court) to constitute a violation of the Due Process provisions of the United States Constitution. To avoid repetition we respectfully refer the Court to Pages 3, 4, 14 and 15 of Appellant's brief in respect to the motion to dismiss or affirm.

The case of *International Harvester Company v. Evatt,* also cited by the Court, is wholly out of line with the facts of the present case, and does not, we respectfully submit, warrant the order of dismissal. In its decision of the *International Harvester Company* case, this Court used the following language:

> "Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments.

The present case does not, as did the *International Harvester Company* case, present a charge that the state had levied a tax upon interstate commerce, and what this Court said in that relation is without effect in this case. We again refer the Court to Pages 3, 4, 5, 14 and 15 of Appellant's brief in opposition to the motion to dismiss or affirm.

Under facts identical with those considered by this Court in its decision in the *Hans Rees* case Appellant here claims that the taxing authority overlooked the uncontroverted fact that substantial earnings were derived by Appellant from foreign purchases and out-of-state sales, which solely accounted for the tax complained of. It is Appellant's contention that this violated the Due Process provisions of the United States Constitution. The decision of this Court in *Butler Bros. Company v. McColgan* and *International Harvester Company v. Evatt* (supra), cast no shadow upon the merits of Appellant's claim.

In its effort to comply with the spirit of the rules Appellant has made this Petition very brief. We trust, however, that the Court will not mistake this brevity as indicating a lack of faith in the merits of Appellant's Petition for Rehearing. We believe that Appellant is entitled to a full hearing of this case on its merits and that such a decision will serve the desired purpose of clearing up the serious uncertainty which now exists as to the construction of the allocation provisions of Section 10 of the California Bank and Corporation Franchise Tax Act.

Appellant respectfully prays that this Honorable Court grant this Petition and accord to Appellant the opportunity to present its case upon the merits.

Dated, San Francisco, California,
October 18, 1950.

Respectfully submitted,
W. F. WILLIAMSON,
PERCY J. CREEDE,
Attorneys for Appellant and Petitioner.

W. S. CULBERTSON,
Of Counsel.

CERTIFICATE OF COUNSEL REGARDING
PETITION FOR REHEARING.

This is to certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of any delay.

Dated, San Francisco, California,
October 18, 1950.

W. F. WILLIAMSON,
Counsel for Appellant.